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Case No. 82-1019

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

QUALITY HEALTH SERVICE, INC., ET AL.,
Appellants,

vs.

WILLIAM W. JOHNSTON, CHAIRMAN,
INDUSTRIAL COMMISSION OF OHIO, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether, under standards set forth by this Court in *Lemon* v. *Kurtzman*, 407 U.S. 602 (1971), and *Califano* v. *Jobst*, 434 U.S. 47 (1977), the provisions of Section 4123.29 of the Ohio Revised Code, which requires the Industrial Commission to classify occupations or industries with respect to their degree of hazard, to determine the risks of the different classes and to fix the rates of premium to provide a fund for the compensation of workers provided for in Chapter 4123 of the Ohio Revised Code, are in violation of the Establishment and Equal Protection Clauses of the Constitution of the United States when applied so as to establish two classifications for nursing homes in Ohio, one class proprietary and the other class being affiliated with any religious organization and/or operating as a non-profit or philanthropic organization, with lower premiums required of a nursing home solely by reason of its affiliation with any church, when both proprietary and philanthropic nursing homes are licensed pursuant to Chapter 3271 of the Ohio Revised Code which sets forth no difference in building safety, equipment, furnishings, fixtures, staffing or any other standards to receive a license to operate.

PARTIES TO THE ACTION IN THE OHIO SUPREME COURT

The plaintiffs in this action in the Ohio Supreme Court were: Quality Health Services, Inc., Ethicare, Inc., and James D. Incorporated, all proprietary health care facilities located in Cincinnati, Ohio. In addition, the Common Pleas Court certified a class of plaintiffs consisting of all proprietary nursing homes which are presently or were within the applicable statute of limitations duly licensed and operating in the State of Ohio to provide nursing service through staff employed for that purpose and which are amenable to the Workers' Compensation Act of Ohio.

The defendants in this action, who were named in their official capacities, were William W. Johnston, Chairman of the Industrial Commission of Ohio; Raymond A. Conner, Vice-Chairman of the Industrial Commission of Ohio; Leonard T. Lancaster, Member of the Industrial Commission of Ohio; Robert C. Daugherty, Administrator of the Bureau of Workers' Compensation; the Industrial Commission of Ohio and the Bureau of Workers' Compensation.

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JURISDICTIONAL STATEMENT

The appellants, Quality Health Services, Inc., respectfully submit this jurisdictional statement in support of their appeal of the decision of the Supreme Court of Ohio.

OPINION BELOW

The opinion of the Supreme Court of Ohio, dated September 15, 1982, appears in the appendix hereto, p. A-17, *infra.* This decision has not been reported.

JURISDICTION

This is a class action suit brought by the proprietary nursing homes in the State of Ohio against the Industrial Commission, its members, the Bureau of Workers' Compensation and the Administrator of the Bureau of Workers' Compensation.

The plaintiff-appellants sought declaratory and injunctive relief from the Franklin County Common Pleas Court. The basis of the claim is that the defendants and their predecessors in office have defined two classifications of nursing homes in Ohio; proprietary and church-related, or philanthropic, non-profit, and have set basic workers' compensation rates of contribution for employers that require a contribution from the proprietary nursing homes in excess of 200% above that required from the church-related or philanthropic, non-profit nursing homes; that this decision was made despite licensing requirements identical for both classes, and that this policy violates the equal protection and establishment clauses of the United States Constitution.

On January 5, 1981, the Court of Common Pleas ruled in favor of the defendants, and plaintiff-appellants appealed to the Court of Appeals, Tenth Appellate District of

Ohio, which ruled in favor of the defendants on May 25, 1982. Plaintiff-appellants then appealed to the Supreme Court of Ohio which, on September 15, 1982, *sua sponte* dismissed the appeal, holding that no substantial constitutional question existed.

Pursuant to the provisions of 28 U.S.C. Section 2101(c), a notice of appeal to this Court was duly filed in the Supreme Court of Ohio on November 15, 1982. See p. A-42, *infra*.

This appeal is being docketed within ninety days from the date of filing the notice of appeal and after entry of the judgment appealed from. The jurisdiction of this Court is invoked under 28 USC Section 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment, United States Constitution:

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1, Fourteenth Amendment, United States Constitution

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article II, Section 35, Ohio Constitution:

This section is set forth in the appendix hereto, p. A-45, *infra*.

Section 4121.131, Ohio Revised Code:

This statute is set forth in the appendix hereto, p. A-47, *infra*.

Section 4123.29, Ohio Revised Code:

This statute is set forth in the appendix hereto, p. A-48, *infra*.

Section 4123.34, Ohio Revised Code:

This statute is set forth in the appendix hereto, p. A-49, *infra*.

STATEMENT OF THE CASE

This case was initiated on November 16, 1979, by the filing of a complaint in the Franklin County Common Pleas Court. The plaintiffs, proprietary nursing homes in Ohio, requested declaratory and injunctive relief on the basis that the named defendants below had set basic premium rates of contribution to the Workers' Compensation fund for employers in proprietary nursing homes which were arbitrary and capricious and grossly disproportionate to other nursing home employers similarly situated and were unsupported and without reference to any previously done study, report, or other proof that their operation subjected employees to any risk greater than employees of philanthropic and/or non-profit nursing homes and that this method of classification violated the Equal Protection clause of the United States Constitution.

After discovery was initiated, plaintiff discovered that the sole criteria used for distinction in manual classifications between philanthropic and proprietary nursing homes was based on religious affiliations of the philanthropic and/or non-profit nursing homes, and with the court's permission amended its complaint to further allege that the classification practices of the named defendants violated the Establishment Clause of the United States Constitution. Thus, the question presented to this Court was first raised in the Court of Common Pleas by the filing of the complaint and the amended complaint.

At the trial, testimony established that the plaintiff-appellants are Ohio corporations organized for profit, and that they are duly licensed proprietary nursing homes who contribute to the defendant-appellees in an amount determined by the Workers' Compensation Act. The following base rate differentials were stipulated:

Year	Manual 9045 Proprietary N.H.	Manual 9062 Philanthropic N.H.
7-1-74	$2.90/$100.00 payroll	$1.12/$100.00 payroll
7-1-75	$3.21/ " "	$1.24/ " "
7-1-76	$4.17/ " "	$1.61/ " "
7-1-77	$5.42/ " "	$2.09/ " "
7-1-78	$4.33/ " "	$1.67/ " "
7-1-79	$3.60/ " "	$1.18/ " "

It was further stipulated that the Industrial Commission is required to classify occupations or industries with respect to their degree of hazard and to fix rates of premium to maintain a reasonable surplus fund. A manual classification signifies a particular group, by industry, with the same level of hazard. Each employer in that group therefore pays the same rate.

On February 15, 1979, a meeting was held by Mr. William Johnston, Chairman of the Ohio Industrial Commission concerning manual classifications. Prior to the meeting, non-profit and profit nursing homes had historically been classified under two separate manual numbers. There had been no study done to form a basis or justification for this dichotomy.

The actuarial section and underwriting section of the Bureau of Workers' Compensation are responsible for setting manual classifications and rates. At the February 15th meeting, Mr. Johnston decided there was no rational basis for the classifications and ordered that the two manual classifications (profit and non-profit nursing homes) were to be merged effective July 1, 1979. It was not until a concerted "lobbying" effort on behalf of the non-profit facilities that the decision to abolish the distinction was reversed.

After the controversy generated by the February 15th meeting, a purported study was conducted for the first

time ever to determine if there was a difference in the degree of hazard involved between proprietary and non-profit, religiously affiliated nursing homes. Although any study is open to interpretation, the defendants alleged before the trial court that the study would support a rate of contribution from employers in proprietary nursing homes of up to 50% more than the rate for religiously affiliated non-profit homes. This study, prepared in time to allow its introduction at trial, was the only evidence presented by defendants to support the unfavorable rate that has been levied against proprietary nursing home employers since the State Insurance Fund Manual was established seventy years ago. Defendants introduced no evidence to support the actual rate difference of two to three hundred percent. There are still no guidelines or formulae used in establishing the type of work or hazards involved; the classifications are still arbitrarily made on a case-by-case basis.

Both proprietary and religiously affiliated non-profit nursing homes are licensed pursuant to the identical standards contained in Chapter 3721, Chio Revised Code and the same regulations enacted thereunder. Yet the mere affiliation with a church automatically places a nursing home within Manual No. 9062, for which the lower premium rate is assessed. No study has ever been made to determine if there is any rational nexus between being a religious organization and receiving a lower premium contribution rate, nor has any legislative or psuedo-legislative body ever declared there is a secular purpose for this preferential treatment of nursing homes affiliated with religious organizations. Thus, plaintiff alleged at trial that both the Equal Protection clause and the Establishment clause of the United States Constitution were violated by this practice.

At the conclusion of the trial, both parties submitted

findings of facts and conclusions of law. Subsequently, the trial court found in favor of defendants-appellees, and further that the court did not have jurisdiction to enjoin the Industrial Commission. Therefore, the case was dismissed.

At the Court of Appeals, the plaintiffs-appellants' five assignments of error were overruled, and the judgment of the Franklin County Common Pleas Court was affirmed. The Supreme Court of Ohio, in its decision of September 15, 1982, *sua sponte* dismissed the appeal, holding that no substantial constitutional question existed. Plaintiff-appellants have timely filed a Notice of Appeal and are presently before this Court.

THE QUESTION IS SUBSTANTIAL

The Fourteenth Amendment to the United States Constitution guarantees equal protection which may not be denied "to any person". A corporation is a "person" within the meaning of that clause. *Santa Clara County* v. *Southern Pac, Railroad Company*, 118 U.S. 394, 396 (1886); *see, Bell* v. *Maryland*, 378 U.S. 226, 262 (1964) *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562 (1949); *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77 (1938).

The function of the Equal Protection clause is to measure the validity of classifications created by state laws. *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 59 (1973) (Stewart, J., concurring.)

To be consistent with equal protection, a classification must rest upon some difference that bears a reasonable relation to the act in respect to which the classification is proposed; mere arbitrary selection cannot be justified by being called classification. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U.S. 150, 155, 159 (1897). Likewise, legislation cannot be based upon distinctions which irrationally differentiate between identically situated persons. *Califano* v. *Jobst*, 434 U.S. 47, 53 (1977).

Article II, Sec. 35 of the Constitution of Ohio provides for the creation of a workers' compensation system in Ohio, which system calls for compulsory contributions by employers within the scope of applicable statutory provisions and is intended to pay compensation to employees injured in the course of their employment. Article II, Sec. 35 of the Constitution of Ohio, provides in part as follows:

> ". . . Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix

rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. . ."

Pursuant to Article II, Sec. 35, the General Assembly of the State of Ohio promulgated a statutory scheme for that system of workers' compensation including Sec. 4121. 131, Revised Code, which states, in part, the following:

> "The industrial commission, in addition to the specific powers, authority, and duties vested in and imposed upon it by section 4121.13 of the Revised Code, shall classify occupations or industries as provided in sections 4123.29 and 4123.31 of the Revised Code, fix rates and determine contributions as provided in sections 4123.34 and 4123.38 of the Revised Code. . ."

Section 4123.29, Revised Code, states in part as follows:

> "The industrial commission shall classify occupations or industries with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total payroll in each of said classes of occupation or industry sufficiently large to provide a fund for the compensation provided for in Chapter 4123 of the Revised Code, and to maintain a state insurance fund from year to year. . ."

Section 4123.34, Revised Code, states in pertinent part:

> "The industrial commission, in the exercise of the powers and discretion conferred upon it in Section 4123.29 of the Revised Code, shall fix and maintain, for each class of occupation, or

> industry, the lowest possible rates of premium consistent with the maintenance of a solvent state insurance fund and the creation and maintenance of a reasonable surplus, after the payment of legitimate claims. . ."

In summary, Article II, Sec. 35 of the Constitution of Ohio and the applicable statutory provisions quoted above require that the defendants, in operating a system of workers' compensation, determine the rate of premiums to be contributed to the state within a system of classifications of occupations and industries based upon the degree of hazard inherent in the employment. Basic premium rates must be the lowest possible to maintain solvency in the fund. The Supreme Court of Ohio in the case of *State ex rel Reaugh Const. Co.* v. *Industrial Commission of Ohio*, 119 Ohio St. 206 (1928), stated that:

> "Classification cannot be applied to an occupation or industry as an individual unit. The classification, contemplated by the Workers' Compensation Law. . . relates to occupations or industries as a class, operating generally under similar conditions . . ."

Evidence was presented before the trial court that there is no valid distinction between proprietary and non-profit, religiously affiliated nursing homes. The same licensing and certification standards exist for both groups. That is, both groups must meet the same building, safety, equipment, furniture, fixture, staffing and other standards to receive a license. This is clearly a case of "operating under similar conditions." The standard for setting rates is "the degree of hazard", Article II, Sec. 35 of the Ohio Constitution, *supra;* yet the determining factor used by the Industrial Commission in classifying nursing homes is the corporate structure, profit vs. non-profit, secular and pro-

prietary vs. religiously affiliated and philanthropic. As was shown at trial, there are no other similar classifications based on corporate or entity structure within the entire manual classification system of workers' compensation in Ohio. Plaintiff-appellants contend this is because reasonable minds could not believe that classifying by corporate structure, without more, is rationally related to a state end of providing protection for working people at the lowest feasible cost to the employer. The classification system rationally related to this end is the one mandated in the Ohio Constitution, a system which classifies based on degree of hazard to the employee. States may establish classifications without violating the Equal Protection Clause of the Fourteenth Amendment. However, once these classifications are determined upon specific findings of the hazards involved within an industry, classifications cannot be based on arbitrary distinctions having no rational relationship to the intended state ends. The Workers' Compensation Act, to be constitutional, must not be arbitrary, unreasonable, or fundamentally unjust or oppressive. *Marshall* v. *Andrew J. Mahoney Co.*, 56 F. 2d 74 (9th Cir. 1932). As was shown at the trial, defendants have, from July 1, 1974, and prior to that time, required plaintiffs and their class to contribute to the Workers' Compensation Fund at a discriminatory, unlawful, arbitrary and unreasonable rate bearing no relationship to the "degree of hazard" or risks inherent in the operation of a nursing care facility. Plaintiff-appellants have clearly established a violation of the equal protection clause beyond a reasonable doubt, and the trial court was in error not to conclude so.

Defendants prepared an after-the-fact study in the face of litigation in an attempt to justify the difference in the two manual classification. As was shown by the testimony, this study was not statistically valid, contained facts

and figures which were not verified or assimilated by anyone qualified to do so, and which purported to be a comparison between profit and non-profit nursing homes, but was instead a comparison of profit nursing homes with sundry groups, including non-profit nursing homes, Y.M.C.A.s, Boy Scouts, and other such organizations. Appellant contends this study must be seen as the scientifically useless sham which it is and should be ordered held for naught by this Court as a matter of law. Aside from this piece of alleged scientific research, there is absolutely no support for the classification based on corporate or entity structure.

Regardless of this Court's holding as to the proper effect of this "study", there is no evidence whatsoever indicating any rational basis for placing a nursing home in the favored manual classification solely because it is affiliated or becomes affiliated with a church or religious organization. To sustain the proposition that this classification is rational is to hold that reasonable minds could conclude that one of two identically situated nursing homes could be less hazardous solely because it is owned or purchased by a church. The testimony at trial was that a nursing home in the category discriminated against could and would be automatically placed in the favored category upon its affiliation with a religious organization. This is a classification without reason and violates the Equal Protection clause of the Constitution of the United States.

This automatic preference in rate given solely by reason of religious affiliation also violates the Establishment Clause of the Constitution of the United States. The Establishment Clause of the First Amendment to the United States Constitution provides that government shall neither prefer nor penalize religion. Neutrality on behalf of the government is required. The State must confine itself to secular objectives, and neither advance nor impede reli-

gious activity. *Roemer* v. *Board of Public Works*, 426 U.S. 736, 747 (1976). The Establishment Clause erects a "wall of separation between church and state." *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947). In setting up the wall between church and state, the Establishment Clause has been interpreted to protect against three main concerns: "sponsorship, financial support, and active involvement of the sovereign in religious activity."*Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970).

Appellant contends that the religiously affiliated nursing homes are so intrinsically imbibed with the purpose, practice and propagation of religion that the Court may take judicial notice that state aid to them is aid to religion. The nursing homes are a method by which religious societies may put their faith into practice. Religious instruction and the opportunity for patients to practice their faith and attend church services on the premises are a primary factor of many of these nursing homes. Many of these nursing homes are undoubtedly chosen by the potential patients for the very reason that they are church-affiliated. Certainly the good work done within these homes promotes both the religious beliefs of the staff and the particular church or religious society which operates them.

There are three tests a law must meet if it is challenged under the Establishment Clause: (1) the statute must have a secular legislative purpose; (2) the statute's primary effect must be one that neither advances nor inhibits religion; (3) the statute must not foster an escessive government entanglement with religion. *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971). The statute as here applied to the detriment of the appellant has no secular purpose; on the contrary, the undisputed testimony offered was that a nursing home could and would receive a more favorable classification solely due to its being

owned by a church or other religious organization. This is not a case of the state giving aid to the secular activities of a church; it is a case where an institution subject to the same licensing requirements and regulations as a proprietary nursing home is given a favorable classification without any finding or conclusion by the defendants except that the nursing home is a religious institution. There is then no secular purpose for this statute as applied.

The statute as applied has the primary effect of advancing religion. Every nursing home must have income exceeding its expenses if it is to survive. The state, in discriminating in favor of church related nursing homes by awarding them a favorable rate, is obviously reducing the expenses of those homes and directly contributing to their viability. As contended above, this Court may take judicial notice that state aid to these homes is state aid to religion.

In the case at hand, the testimony of Mildred Brady offered by way of deposition, clearly establishes an excessive government entanglement with religion in the classification scheme between proprietary and philanthropic nursing homes.

Mildred Brady was the Director of the Underwriting Section of the Bureau of Workers' Compensation during the period between 1977 and September, 1979. That particular section of the Bureau was responsible for determining what particular industries or occupations were assigned to particular manual classifications. Ms. Brady testified that virtually all non-profit nursing homes are affiliated with the church. She further testified that the church affiliation is the basis for the difference in manual classification between profit and non-profit nursing homes. Ms. Brady specifically testified that while she was Director of the Underwriting Section of the Bureau of Workers' Compensation, the basis upon which she would have determined classification was whether or not the particular

nursing home was associated with the church.

Clearly, the statute as applied against plaintiff-appellants fails all three sections of the test of *Lemon* v. *Kurtzman*, *supra*, and is violative of the Establishment Clause of the Constitution of the United States.

The decision of the Supreme Court of Ohio in this matter is erroneous and, it is submitted, should be reversed by this Court.

CONCLUSION

For the reasons set forth above, this Court should note probable jurisdiction of the appeal. Review by this Court will not only resolve the particular issues in this controversy, but also further illuminate the legal standard to be followed by courts in all future cases of this type.

Respectfully submitted,

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APPENDIX A

NO. 82-1044

THE SUPREME COURT OF OHIO
APPEAL FROM THE COURT OF APPEALS
FOR FRANKLIN COUNTY

QUALITY HEALTH SERVICE, INC. et al.,
Appellants

vs.

WILLIAM W. JOHNSTON, CHAIRMAN
INDUSTRIAL COMMISSION OF OHIO et al.,
Appellees

September 15, 1982

This cause here on appeal as of right from the Court of Appeals for Franklin County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

APPENDIX B

NO. 81AP - 324

THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

Quality Health Service, Inc., et al.,
Plaintiffs-Appellants,

v.

William W. Johnston, Chairman,
Industrial Commission of Ohio, et al.
Defendants-Appellees.

Filed
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2:43 P.M.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on May 20, 1982, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

WHITESIDE, P.J., MOYER & COOK, J.J.

By /s/ Robert E. Cook
Judge Robert E. Cook, of the Eleventh District Court of Appeals, sitting by assignment in the Tenth District Court of Appeals.

APPENDIX C

NO. 81AP - 324

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY,OHIO

Quality Health Service, Inc., et al.

Plaintiffs-Appellants

v.

William W. Johnston, Chairman,
Industrial Commission of Ohio, et al.

Defendants-Appellees

DECISION
Rendered on May 20, 1982

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COOK, J.

On December 22, 1980, appellants Quality Health Service, Inc., et al., filed a class-action suit requesting declaratory and injunctive relief on the basis that appellees William W. Johnston, Chairman, Industrial Commission, et al., set basic workers' compensation rates of contribution for employers in propriatary nursing homes which violated the equal protection, due process and establishment clauses of the United States Constitution and the Ohio Constitution, and R. C. 4121.131, 4123.29 and 4123.34.

After a trial, the court found that there was no violation of appellants' constitutional rights, and appellees acted pursuant to their statutory duties and entered judgment for appellees. The court also found that it did not have jurisdiction to enjoin the Industrial Commission.

Appellants have timely filed an appeal from the judgment of the trial court and have filed the following five assignments of error:

"1. The trial court erred by not finding that the appellants established violations of the equal protection and due process clauses of the United States and Ohio Constitutions beyond a reasonable doubt.

"2. The trial court erred by not finding that appellees violated the establishment clauses of the United States and Ohio Constitutions by determining a manual classification on the basis of religion for the purpose of setting rates of premiums for employers paying into the workers' compensation insurance fund.

"3. The trial court erred by finding that appellees acted pursuant to their statutory duties in estab-

lishing the manual classifications for proprietary and philanthropic nursing homes.

"4. The trial court erred in finding that it lacked jurisdiction to issue an injunction as proper relief for statutory and constitutional violations.

"5. The trial court erred in admitting into evidence a purported study which lacked relevance and a proper foundation,"

The assigned errors are without merit.

Appellants' first assignment of error contends that appellees set the basic premium rates of contributions for employers in proprietary nursing homes differently than said rates for philanthropic nursing homes only on the basis of profit versus nonprofit. They argue that said action by appellees was arbitrary and capricious and violated their United States Constitution and Ohio Constitution equal protection and due process rights.

To be consistent with equal protection, a classification must rest upon some difference that bears a reasonable relationship to the act, in respect to which the classification is proposed. Mere arbitrary selection cannot be justified by being called classification. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, (1897), 165 U.S. 150.

Appellants' due process arguments are apparently addressed to substantive process. As to substantive due process, the Ohio Supreme Court, in *State, ex rel. Allstate Ins. Co.*, v. *Bowen, Supt. of Ins. et al.*, (1936), 130 Ohio St. 347, held that:

"* * * If the laws passed by the state are seen to have a reasonable relation to a proper legislative purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied."

In the cause *sub judice*, the evidence indicates that the Bureau of Workers' Compensation sets manual classifications subject to the approval of the Industrial Commission, and that a manual classification signifies a particular group by industry with some level of hazard and, therefore, are the same rate. The profit nursing homes were placed in Manual 9045, and nonprofit nursing homes were placed in Manual 9062. It was stipulated that the base rate differentials between the two manuals were different.

The evidence also indicated that, at the time the profit and nonprofit nursing homes were placed in the two different manual specifications, no study had been done to form a basis or justification for treating them differently. As a result of a meeting on February 15, 1979, appellees decided to merge the two manual classifications, effective July 1, 1979, because there was no "justification for a difference."

Appellees then requested the actuarial section of the Bureau of Workers' Compensation to perform an actuarial study to determine whether there was a difference. The results of the study showed a "significant" difference between the hazards of the profit nursing homes as compared to nonprofit nursing homes.

Based upon the study, appellee William W. Johnston reversed his order to merge the two classifications and restored the original classifications.

At trial, appellees also produced actuarial evidence which supported the classifications set forth in the State Insurance Fund Manual. Robert Finger, a fellow of the Casualty Actuarial Society and a member of the American Academy of Actuaries, testified in regard to a study he performed: (Tr. 96 - 101)

> "A. Okay. What the study was was to take out of Manual 9062, which includes a group of charities or non-profit organizations - it extricated the nursing

homes within that manual classification and treated that loss experience as if that had been a separate manual for the years 1978, 1979 and calculated what the base rates would have been for those years, had the non-profit nursing homes been split out.

"Q. And was that also done with 9045?

"A. 9045 is just the profit-making nursing homes, and they were already their own classification. So there's nothing special done with that.

"Q. Are you aware of any outside insurance carriers that split out, say of the nursing-home industry, on the basis of profitability or non-profit?

"MR. WEBSTER: Object.

"THE COURT: Overruled. You may answer.

"A. In malpractice insurance it is very common for hospitals and nursing homes to be classified based on the profit, non-profit or governmental status.

"MR. TATARU: Move to strike. Non-responsive.

"THE COURT: Overruled.

"Q. (By MR. FOX) Now with regard to that study that you have there, are you familiar with the methodology used in making that study?

"A. Yes.

"Q. And is that a valid method of calculating the base rate?

"A. Yes.

"* * *

"Q. As a result of that study were you able to find any difference in the philanthropic as opposed to the profit nursing homes?

"A. Yes, based on the study, the cost for the profit homes should be about 50 percent higher - or is - the cost is about 50 percent higher and therefore the rate should be about 50 percent higher for the profit homes than for the non-profit homes."

We conclude that the evidence shows that there was a sound, reasonable basis for the different classifications. Therefore, the different classifications for profit and nonprofit nursing homes were not arbitrary or capricious, and thus did not violate the constitutional equal protection or due process provisions.

Appellants' second assignment of error contends that the trial court erred in finding that appellees did not violate the establishment clauses of the United States Constitution and Ohio Constitution. They argue that the evidence shows that virtually all nonprofit nursing homes are affiliated with churches, and that church affiliation was the basis for the difference in manual classification between profit and nonprofit nursing homes.

Mildred Brady, at one time the Director of the Underwriting Section of the Bureau of Workers' Compensation, testified that, while she was director, she would have de-

termined classification on the basis of whether or not the particular nursing home was associated with a church.

However, evidence indicates that Mrs. Brady also testified that she did not have the final authority to determine whether or not a particular employer of industry gets placed in a particular classification. Rather, she testified, while she was there, Mr. Bentz was the person who made the final determination and appeals could be taken from his decision to an adjudicating committee and then to the three commissioners.

Bentz testified: (Tr.119)

"Q. Mr. Bentz, would you *please tell us what the Underwriting Unit does to classify philanthropic homes?*

"A. Well, *they must demonstrate to the Bureau that they are a non-profit status.*

"Q. Does it have anything to do with whether they are religious or not?

"A. *Under Manual Code 9062 there are religious organizations, but in addition to that there are other organizations who just demonstrate non-profit status.* They are not affiliated, as such, with religious organizations. So there are the two included there." (Emphasis added.)

We conclude that the trial court properly found no violation of the establishment clause of the United States Constitution or Ohio Constitution.

Appellants' third assignment of error argues that the trial court erred in finding that appellees did not violate their statutory duties.

R.C. 4123.29 states, in part, as follows:

"The industrial commission shall classify occupations or industries with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total payroll in each of said classes of occupation or industry sufficiently large to provide a fund for the compensation provided for in Chapter 4123. of the Revised Code, and to maintain a state insurance fund from year to year. * * * "

R.C. 4123.34, in pertinent part, states:

"The industrial commission, in the exercise of the powers and discretion conferred upon it in section 4123.29 of the Revised Code, shall fix and maintain, for each class of occupation, or industry, the lowest possible rates of premium consistent with the maintenance of a solvent state insurance fund and the creation and maintenance of a reasonable surplus, after the payment of legitimate claims * * * ."

Appellants argue that the trial court's conclusion of law No. 4, which states "Plaintiffs must prove beyond a reasonable doubt that there is no state of facts which may reasonably be conceived which would justify separate 'State Insurance Fund Manual' classification, * * *" re-

ferred to their claim of statutory violations by appellees.

A reading of the trial court's findings of fact and conclusions of law indicates that, by his conclusions of law No. 3, 4, and 5, the trial court was speaking of "classifications" and the denial of equal protection.

The only finding by the trial court as to any violation of statutory duties is conclusion of law No. 11, which was a finding that there was no violation of appellees' statutory duties.

Appellants argue that the acts of appellees in carrying out their statutory duties acted in an arbitrary, capricious, and unreasonable manner. However, such argument is without merit for the reasons set forth as to the first assignment of error.

In their fourth assignment of error, appellants claim that the trial court erred in finding that it lacked jurisdiction to issue injunctions. However, such a finding cannot be prejudicial error since the court found appellees had not violated any constitutional or statuory provisions.

In their fifth, and final, assignment of error, appellants contend that the trial court erred in admitting into evidence a study by William Darlage, Operations Coordinator and Adjustment Unit Supervisor in the Actuarial Section of the Bureau of Workers' Compensation. The study attempted to determine the base rates of the manual specifications as they were used for the July 1, 1978, and July 1, 1979, rating periods.

However, the deposition of William Darlage was introduced by appellants during the trial. His study was marked as Exhibit A in the deposition.

It is well settled that a party cannot complain of error that he has introduced into the trial. A party who has introduced a deposition into evidence cannot avail himself of error in its admission. *Hulett* v. *Friedrich* (1926), 115 Ohio St. 25. Nor can a party complain that evidence is intro-

duced by the adverse party which serves to explain or rebut evidence introduced by himself. *Thomas F. Taylor* v. *John Boggs*, (1870), 20 Ohio St. 516.

In view of the testimony of William Darlage, the "study" was relevant.

For the foregoing reasons, appellants' five assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas, is affirmed.

Judgment affirmed.

WHITESIDE and MOYER, JJ., concur.

COOK, J., of the Eleventh District Court of Appeals, sitting by assignment in the Tenth District Court of Appeals.

APPENDIX D

CASE NO. 79CV - 11 - 5606

COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

QUALITY HEALTH SERVICE, INC.,
et al

Plaintiffs

vs.

WILLIAM W. JOHNSTON, Chairman.
Industrial Commission of Ohio
et al

Defendants

DECISION
Rendered this 5th day of January, 1981

SHOEMAKER, J.

This is a class action brought by the proprietary nursing homes in the State of Ohio against the Industrial Commission and the Bureau of Workers' Compensation. Plaintiffs are seeking declaratory and injunctive relief for the actions of the defendants and their predecessors in setting the premium rates for contribution to the State Insurance Fund.

The defendants in this action are the Industrial Commission of Ohio, the members of the Industrial Commission, the Bureau of Workers' Compensation and the Administrator of the Bureau of Workers' Compensation. The plaintiffs are the proprietary nursing homes operating in Ohio. The plaintiffs have been classified, for rate making pur-

poses, under State Insurance Fund Manual #9045. Philanthropic nursing homes and hospitals are classified, for rate making purposes, in different classifications. This is the alleged "wrong" of which the plaintiffs complain.

The Industrial Commission of Ohio is charged, pursuant to Section 4123.29 Ohio Revised Code, with a duty to classify industries or occupations with respect to their degree of hazard. The Commission must determine the risks of the different classes and fix their respective rates of premiums based upon the total payroll in each of the classes of occupation or industry. Each class must be sufficiently large enough to provide a reasonable fund for the workers' compensation system. The Constitutional authority for this section is Article II, Section 35, Ohio Constitution, which states in part:

> ". . . Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto."

Pursuant to this duty, the Industrial Commission of Ohio has established the State Insurance Fund Manual which sets forth approximately 233 different categories of occupation or industry. These categories of occupation or industry within the State Insurance Fund Manual are referred to as "manual" numbers.

When an employer applies for workers' compensation coverage, the employer is assigned a "risk" number. The employer (or "risk") is then assigned to the "manual" number which most closely describes its operation. The employer is then required to pay for its workers' compen-

sation coverage based upon the actuarial "experience" of the "manual" category.

The actuarial "experience" of a "manual" is basically calculated by taking the past losses and payroll of that "manual" to reach an average rate that must be assessed to collect premiums to cover the losses that will be incurred for the next year by that manual category. Each employer (or "risk"), if they meet certain minimum criteria, may then be "merit" or "penalty" rated within that manual. This basically means that if the "risk" has a good loss record, he will receive a credit of up to 95% the base rate and if he has a bad loss record, he will receive a penalty of up to 95% of the base rate.

Plaintiffs are seeking a declaration from this court that the defendants, in setting the "manual" classifications, violated their Due Process rights under the United States and Ohio Constitutions. They further allege violations of the Equal Protection clauses of the United States and Ohio Constitutions and Article II, Section 35 of the Ohio Constitution. Plaintiffs also seek various injunctions against defendants. These separate forms of relief shall be dealt with separately in this decision.

Plaintiffs, in Sections E, F, and G of their prayer for relief, seek:

> "E. That this court issue a permanent injunction, prohibiting the defendants from requiring contributions of plaintiffs and their class at rates set in the manner the rates of which the complaint is made were set, from the defendants approving, using and forcing contributions by rates in violation of plaintiff's and their class' Due Process and Equal Protection Rights under the United States and Ohio Constitutions, from violating Article II, Section 35 of the Ohio Constitution and

4121 and 4123 of the Ohio Revised Code in setting rates for plaintiffs and their class.

F. That this Court issue a mandatory injunction requiring defendants to determine and set rates of contribution by plaintiffs and their class that meet the statutory and constitutional provisions applicable to the workers' compensation system in Ohio;

G. That this Court issue a mandatory injunction requiring defendants to restore to plaintiffs and their class, through the Court, the difference between what was contributed and what should have been contributed during which an unlawful disparity existed between plaintiffs and their class and philanthropic nursing homes and plaintiff and their class and hospitals."

This Court, however, lacks jurisdiction to grant the type of relief requested in these sections as the legislature has expressly forbidden this type of relief.

Section 4123.21, Ohio Revised Code, states:

"Injunction shall not issue suspending any classification or rate adopted.
(CC S1465 - 105)

No injunction shall issue suspending or restraining any order, classification, or rate adopted by the industrial commission, or any action of the auditor of state, treasurer of state, attorney general, or the county auditor or county treasurer of any county, required to be taken by them or any of them by

sections 4123.01 to 4123.94, inclusive, of the Revised Code. This section does not effect any right or defense in any action brought by the commission or the state in pursuance of authority contained in such sections."

Therefore, defendants respectfully requested a directed verdict as to Sections E, F & G of plaintiffs' prayer for relief.

Plaintiffs, in Section C of their prayer for relief, seek a declaration from this Court that the use of different rates of contributions by and for proprietary and philanthropic nursing homes and hospitals to be in violation of the Equal Protection Clauses of the United States and Ohio Constitutions.

The limitations placed upon governmental action by the Equal Protection Clauses of the Ohio and United States Constitutions are essentially identical. *Kinney* v. *Kaiser Corp.*, 41 Ohio St. 2d 120. The burden of proving the unconstitutionality of a statute rests on the party assailing it and a classification will not be set aside as a denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it. *Metropolitan Casualty Ins. Co. of New York* v. *Brownell*, 294 U.S. 580.

In order for plaintiffs to prevail, they must prove that there is no state of facts which may reasonably be conceived which would justify separate "manual" classifications for hospitals, proprietary and philanthropic nursing homes. Furthermore, this must be proven beyond a reasonable doubt. *Board of Education* v. *Walter*, 58 Ohio St. 2d 368. The plaintiffs have failed to meet this burden of proof.

Plaintiffs, in Section B of their prayer for relief, have requested that this Court declare the premium rates of plaintiffs and their class have been determined and set in violation of plaintiffs' Due Process rights under the United States and Ohio Constitutions.

Due Proces of Law under the United States Constitution and "due course of law" under the Ohio Constitution are "one and the same thing" (*Adler* v. *Whitbeck*, 44 Ohio St. 539). There is a strong presumption that classifications in state legislation are based upon adequate grounds. *Middletown* v. *Texas Power and Light Co.*, 249 U.S. 152, 39 S. Ct. 227. *State ex rel Lourin* v. *Industrial Commission*, 138 Ohio St. 618. Plaintiffs have failed to prove they were denied their due process rights.

This Court finds that there was no violation of plaintiffs' constitutional rights and that defendants acted pursuant to their statutory duties. Therefore, Plaintiffs' petition is hereby dismissed with prejudice and the costs taxed to plaintiffs.

Counsel shall prepare and file proper Judgment Entry per court rule.

/s/ FRED J. SHOEMAKER, JUDGE

Appearances:

Terry Tataru
Geoffrey E. Webster
Attorneys for Plaintiffs

Bernard C. Fox, Jr.
Assistant Attorney General
Attorney for Defendants

APPENDIX E

COURT OF COMMON PLEAS OF
FRANKLIN COUNTY, OHIO

Case No. 79 CV-11 - 5606

QUALITY HEALTH SERVICE, INC.,
et al

Plaintiffs,

vs.

WILLIAM W. JOHNSTON, Chairman,
et al

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial on December 22 and 23, 1980, and the Court having heard the evidence and considered the stipulations of the parties, and the plaintiffs having requested separate findings of fact and conclusions of law pursuant to Ohio Civil Rule 52, the Court therefore finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. This is a class action brought by the proprietary nursing homes in the State of Ohio against the Industrial Commission of Ohio, the members thereof, the Bureau of Workers' Compensation and the Administrator thereof.

2. The named plaintiffs are Ohio corporations organized for profit under the laws of the State of Ohio and are operating as duly licensed proprietary nursing homes through staff employed for that purpose.

3. The defendants are the Industrial Commission of Ohio, the members of the Industrial Commission of Ohio, the Bureau of Workers' Compensation and the Administrator of the Bureau of Workers' Compensation.

4. Each named plaintiff did contribute and continues to contribute to the State Insurance Fund in amounts determined by the defendants as and for Workers' Compensation as employers covered by the Workers' Compensation Laws of Ohio.

5. The defendant, Industrial Commission of Ohio, classifies occupations or industries with respect to their degree of hazard and fixes rates of premium in each of the classes of occupation or industry sufficiently large to maintain a State Insurance Fund and to maintain a reasonable surplus fund.

6. The defendant, Industrial Commission of Ohio, has set forth approximately 233 classes of occupation or industry with respect to their degree of hazard in the "State Insurance Fund Manual."

7. "State Insurance Fund Manual" number 9045 includes Extensive Care Homes, Homes for the Aged, Nursing Homes and Rest or Convalescent Homes.

8. Hospitals, philanthropic and non-profit nursing homes are not classified in "State Insurance Fund Manual" number 9045, but are classified under different "State Insurance Fund Manual" numbers.

9. The base rate of contribution for each "State Insurance Fund Manual" classification is based upon the "actuarial" experience of the employers within that classification.

10. Defendants have performed an actuarial study which demonstrated a substantial difference in the losses incurred per unit of payroll between "State Insurance Fund Manual" number 9045 and the philanthropic and non-

profit nursing homes which have been classified in "State Insurance Fund Manual" number 9062.

11. The defendant, Industrial Commission of Ohio, by order dated November 19, 1979, ordered that philanthropic and non-profit nursing homes be reclassified from "State Insurance Fund Manual" number 9045 to "State Insurance Fund Manual" number 9062.

12. The defendant, Industrial Commission of Ohio, ordered that effective July 1, 1979, that the clerical staff of "State Insurance Fund Manual" number 9045 be reclassified to "State Insurance Fund Manual" number 8810, which includes clerical office employees - not otherwise classified.

13. Prior to the order of the defendant Industrial Commission of Ohio, dated November 19, 1979, there had for many years been an historical difference in classification in the "State Insurance Fund Manual" between philanthropic nursing homes and profit nursing homes.

14. Plaintiffs have offered no evidence with regard to the classification of hospitals in the "State Insurance Fund Manual."

CONCLUSIONS OF LAW

1. This Court lacks jurisdiction to issue an injunction suspending or restraining any order, classification or rate adopted the Industrial Commission.

2. The burden of proving the unconstitutionality of a classification rests upon the party assailing it.

3. A "State Insurance Fund Manual" classification adopted by the Industrial Commission of Ohio will not be set aside as a denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.

4. Plaintiffs must prove beyond a reasonable doubt that there is no state of facts which may reasonably be

conceived which would justify separate "State Insurance Fund Manual" classifications for hospitals, proprietary nursing homes and philanthropic nursing homes.

5. The limitations placed upon governmental actions by the Equal Protection clauses of the Ohio Constitution and the United States Constitution are essentially identical.

6. Plaintiffs have failed to show that their constitutional rights to equal protection of the laws have been violated under either the Ohio or United States Constitutions.

7. "Due Process of Law" under the United States Constitution and "due course of law" under the Ohio Constitution are one and the same thing.

8. Due Process does not prevent classification if there is a reasonable basis for such classification and the classification equally affects all persons standing in like relation to the subject matter.

9. Plaintiffs have failed to show that they were denied either their right to "Due Process of Law" under the United States Constitution, or their right to "due course of law under the Ohio Constitution.

10. Plaintiffs have failed to show that defendants have violated their rights under the "Establishment clause" of the United States Constitution.

11. There were no violations of plaintiff's constitutional rights and defendants acted pursuant to their statutory duties.

12. Plaintiffs' complaint must be dismissed.

IT, THEREFORE, IS ORDERED that counsel submit and file proper judgment per court rule.

/s/ FRED J. SHOEMAKER, JUDGE

Appearances:
Terry Tataru
Geoffrey E. Webster
Attorneys for Plaintiffs

Bernard C. Fox, Jr.
Assistant Attorney General
Attorney for Defendants

APPENDIX F

Case No. 79 CV-11-5606

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

Quality Health Services, Inc.,
et al.

Plaintiffs,

vs.

William W. Johnston, Chairman,
The Industrial Commission of
Ohio, et al.,

Defendants.

JUDGE SHOEMAKER

JUDGMENT ENTRY

This cause came on for trial on the 22nd and 23rd days of December, 1980, before the Court, Honorable Fred J. Shoemaker, Judge of Common Pleas Court, presiding, and the Court on motion of the Defendants, directed a verdict for the Defendants at the end of Plaintiffs' case as to the issue of the classification of hospitals in different "State Insurance Fund Manual" classifications from the Plaintiffs. Further the remaining issues having been tried and the evidence adduced by the parties having been heard, and the Court having rendered and filed its Decision on January 5, 1981, and having made and filed Findings of Fact and Conclusions of Law, on or about March 6, 1981, it is hereby ORDERED, ADJUDGED and DECREED that

judgment is entered in favor of Defendants, and Plaintiffs' Complaint is hereby dismissed with prejudice, and with costs taxed to Plaintiffs.

/s/ FRED J. SHOEMAKER, JUDGE

APPROVED:

/s/ Terry Tataru
TERRY TATARU (TAT01)

/s/Geoffrey E. Webster/TT
GEOFFREY E. WEBSTER (WEB 04)

Attorneys for Plaintiffs

/s/Bernard C. Fox, Jr. by Nancy J. Miller
BERNARD C. FOX, JR.
Assistant Attorney General for
the Industrial Commission of
Ohio

APPENDIX G

IN THE SUPREME COURT
STATE OF OHIO

NOTICE OF APPEAL
No. 82 -1044

Quality Health Service, Inc.
3544 Washington Street
Cincinnati, Ohio 45229

Ethicare, Inc.
dba Aaron Convalescent Home
21 West Columbia Avenue
Cincinnati, Ohio 45212

and

James D., Incorporated
dba Hillebrand Nursing Center
4307 Bridgetown Road
Cincinnati, Ohio 45211,
Plaintiffs-Appelants

vs.

William W. Johnston, Chairman
The Industrial Commission of Ohio
65 South Front Street
Columbus, Ohio 43215

Raymond A. Connor, Vice Chairman
The Industrial Commission of Ohio
65 South Front Street
Columbus, Ohio 43215

Leonard T. Lancaster, Member
The Industrial Commission of Ohio
65 South Front Street
Columbus, Ohio 43215

Robert C. Daugherty, Administrator
Bureau of Workers' Compensation
65 South Front Street
Columbus, Ohio 43215

The Industrial Commission of Ohio
65 South Front Street
Columbus, Ohio 43215

and

Bureau of Workers Compensation
65 South Front Street
Columbus, Ohio 43215

Defendants- Appellees.
Defendants- Appellees.

Notice is hereby given that Quality Health Services, Inc., et al., the plaintiffs herein, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of the State of Ohio dismissing the appeal and affirming the judgment of the Franklin County Court of Appeals, entered in this action on September 15, 1982.

This appeal is taken pursuant to 28 U.S.C. Sec. 2101 (c).

Respectfully submitted,

/s/Geoffrey E. Webster
Suite 2610
50 West Broad Street
Columbus, Ohio 43215
Phone: 614/461-1156

/s/Terry Tataru/GEW
137 East Livingston Avenue
Columbus, Ohio 43215
Phone: 614/221-3821

Attorneys for Plaintiffs-
Appellants

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and accurate copy of the foregoing document to Bernard C. Fox, Jr., Assistant Attorney General, 601 Gwynne Building, P.O. Box 1155, Cincinnati, Ohio 45201, attorney for appellee, Industrial Commission of Ohio, on this 5th day of November, 1982.

/s/Geoffrey E. Webster

APPENDIX H

§ 35 Workmens' Compensation.

For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such boards shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision

shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution. (As amended November 6, 1923. To take effect January 1, 1924.)

APPENDIX I

[§ 4121.13.1] § 4121.131 Additional duties and powers of commission.

The industrial commisssion, in addition to the specific powers, authority, and duties vested in and imposed upon it by Section 4121.13 of the Revised Code, shall classify occupations or industries as provided in sections 4123.29 and 4123.31 of the Revised Code, fix rates and determine contributions as provided in sections 4123.34 and 4123.38 of the Revised Code, determine amounts to be credited to the surplus fund as provided in section 4123.34 of the Revised Code, allocate administrative costs as provided in section 4123.342 [4123.34.2] of the Revised Code, adopt rules, and systems of rating, rate revision, and merit rating as provided in sections 4123.32 and 4123.34 of the Revised Code, cause audits of the funds as provided in section 4123.47 of the Revised Code, grant and revoke the privilege of self-insurance as provided in section 4123.35 of the Revised Code, commute payments of compensation and determine applications for final settlements as provided in sections 4123.64 and 4123.65 of the Revised Code, determine claims for additional award under Section 35 of Article II of the Ohio Constitution, exercise the powers and authorities in section 4121.37 of the Revised Code, make settlements of the liability of employers who are not in compliance with Chapter 4123. of the Revised Code and render final determinations of disputed claims as provided in sections 4123.516 [4123.51.6], 4123.517 [4123.51.7], and 4123.518 [4123.51.8] of the Revised Code, except as provided in section 4123.519 [4123.51.9] of the Revised Code.

APPENDIX J

§ 4123.29 Rates of premium; state insurance fund. (GC § 1465-53)

The industrial commission shall classify occupations or industries with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total payroll in each of said classes of occupation or industry sufficiently large to provide a fund for the compensation provided for in Chapter 4123. of the Revised Code, and to maintain a state insurance fund from year to year. The rates shall be set at a level that assures the solvency of the fund. Where the payroll cannot be obtained or, in the opinion of the commission, is not an adequate measure for determining the premium to be paid for the degree of hazard, the commission may determine the rates of premium upon such other basis, consistent with insurance principles, as is equitable in view of the degree of hazard, and whenever in such sections reference is made to payroll or expenditure of wages with reference to fixing premiums, such reference shall be construed to have been made also to such other basis for fixing the rates of premium as the commission may determine under this section.

The commission in setting or revising rates shall furnish to employers an adequate explanation of the basis for the rates set.

APPENDIX K

§ 4123.34 Premium rates fixed and maintained.

The industrial commission, in the exercise of the powers and discretion conferred upon it in section 4123.29 of the Revised Code, shall fix and maintain, for each class of occupation, or industry, the lowest possible rates of premium consistent with the maintenance of a solvent state insurance fund and the creation and maintenance of a reasonable surplus, after the payment of legitimate claims for injury, occupational disease and death that it may authorize to be paid from the state insurance fund for the benefit of injured, diseased and the dependents of killed employees. In establishing rates, the commission shall take into account the necessity of ensuring sufficient money is set aside in the premium payment security fund to cover any defaults in premium obligations. The commission shall observe the following requirements in classifying occupations or industries and fixing the rates of premium for the risks of the same:

(A) It shall keep an accurate account of the money paid in premiums by each of the several classes of occupations or industries, and the losses on account of injuries, occupational disease, and death of employees thereof, and it shall also keep an account of the money received from each individual employer and the amount of losses incurred against the state insurance fund on account of injuries, occupational disease, and death of the employees of such employer.

(B) Ten per cent of the money paid into the state insurance fund shall be set aside for the creation of a surplus until such surplus shall amount to the sum of one hundred thousand dollars, after which time, whenever necessary in the judgment of the commission to guarantee a

solvent state insurance fund, a sum not exceeding five per cent of all the money paid into the state insurance fund shall be credited to such surplus fund. A revision of basic rates shall be made annually on the first day of July.

Revisions of basic rates shall be in accordance with the oldest four of the last five calendar years of the combined accident and occupational disease experience of the commission in the administration of sections 4123.01 to 4123.94 of the Revised Code, as shown by the accounts kept as provided in this section; and the commission shall adopt rules governing said rates revisions, the object of which shall be to make an equitable distribution of losses among the several classes of occupation or industry, which rules shall be general in their application.

(C) The commission may apply that form of rating system which it finds is best calculated to merit rate or individually rate the risk more equitably, predicted upon the basis of its individual industrial accident and occupational disease experience, and may encourage and stimulate accident prevention. The commission shall develop fixed and equitable rules controlling the rating system, which rules shall conserve to each risk the basic principles of workers' compensation insurance.

(D) The commission, from the money paid into the state insurance fund, shall set aside into an account of the state insurance fund titled a premium payment security fund sufficient money to pay for any premiums due from an employer and uncollected which are in excess of the employer's premium security deposit.

The fund shall be in the custody of the treasurer of state and disbursements therefrom shall be made by the bureau of workers' compensation upon order of the industrial commission to the state insurance fund. The use of the moneys held by the premium payment security

fund shall be restricted to reimbursement to the state insurance fund of premiums due and uncollected in excess of an employer's premium security deposit. The moneys constituting the premium payment security fund shall be maintained without regard to or reliance upon any other fund. This section does not prevent the deposit or investment of the premium payment security fund with any other fund created by Chapter 4123. of the Revised Code, but the premium payment security fund shall be separate and distinct for every other purpose and a strict accounting thereof shall be maintained.

Supreme Court, U.S.
FILED
JAN 24 1983
ALEXANDER L. STEVAS
CLERK

CASE NO. 82–1019

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

QUALITY HEALTH SERVICE, INC., et al.,
Appellants,

v.

WILLIAM W. JOHNSTON, Chairman,
INDUSTRIAL COMMISSION OF OHIO, et al.,
Appellees.

ON APPEAL FROM THE
SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM THE DECISION OF THE COURT BELOW

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

BERNARD C. FOX, JR.
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STATEMENT OF THE CASE

This is an Ohio Workers' Compensation rate setting case brought by the proprietary nursing homes in the State of Ohio against the Ohio Industrial Commission, its members, the Bureau of Workers' Compensation and the Administrator of the Bureau of Workers' Compensation. The Plaintiffs–Appellants sought declaratory and injunctive relief from the Franklin County Ohio Court of Common Pleas. The basis for their claim was that the defendants and their predecessors in office, had set basic workers' compensation rates of contribution for employers in proprietary nursing homes, which Plaintiffs claim to have violated the Equal Protection, Due Process and Establishment Clauses of the United States Constitution and the Ohio Constitution, and Ohio Revised Code Sections 4121.131, 4123.29 and 4123.34.

The case was tried on December 22 and 23, 1980. The Trial Court rendered its decision on January 5, 1981, and found that there were no violations of Plaintiffs' constitutional rights and that Defendants acted pursuant to their statutory duties. Plaintiffs then appealed to the Ohio Court of Appeals, Tenth Appellate District. That court, after a thorough review of the record, unanimously held that the evidence showed "that there was a sound, reasonable basis for the different classifications." (App. A-6) From that finding, Plaintiffs–Appellants appealed to the Ohio Supreme Court which, *sua sponte,* dismissed the appeal because no substantial constitutional question existed. Plaintiffs–Appellants have filed a Notice of Appeal and Jurisdictional Statement with this Court. They do not, however, contend that any Ohio statute is in conflict with the Constitution of the United States. Therefore, the following Memorandum is presented as a Motion to Dismiss the appeal and affirm the decision below or, if appropriate, in opposition to the issuance of a Writ of Certiorari.

STATEMENT OF THE FACTS

Approximately three-quarters of a century ago, with the inception of the first Workmens' Compensation Act in Ohio, the Ohio Industrial Commission established the State Insurance Fund Manual. Today, approximately 233 different catagories of occupation or industry are set forth in the State Insurance Fund Manual. These categories of occupation or industry are referred to as "manual" numbers.

The Industrial Commission of Ohio is charged, pursuant to Section 4123.29, Ohio Revised Code (Appellants App. A-48), with a duty to classify industries or occupations with respect to their degree of hazard. The Commission must determine the risks of the different classes and fix their respective rate of premiums based upon the total payroll for each class of occupation or industry based upon insurance principles.

When an employer first applies for workers' compensation coverage, the employer is assigned a "risk" number. The employer (or "risk") is then assigned to the "manual" category which most closely describes its operation. The employer is then required to pay for its workers' compensation coverage based upon the actuarial "experience" of the "manual" category.

The actuarial "experience" of a "manual" is basically calculated by taking the past losses and payroll of that "manual" to reach an average rate that must be assessed to collect sufficient premiums to cover the losses incurred by their manual category.

After assignment, if the employer is dissatisfied with the "manual" category in which he has been placed, he

may appeal his classification to the Adjudicating Committee of the Bureau of Workers Compensation. If the employer is dissatisfied with the Adjudicating Committee's decision, he may then appeal that decision to the full Industrial Commission. It is to be noted that none of the Plaintiffs–Appellants took such appeal.

As the basis for this class action, the Plaintiffs–Appellants have alleged that they have been arbitrarily and capriciously classified in the State Insurance Fund Manual for the past three-quarters of a century to their financial detriment and loss, causing grievous and irreparable harm. The basis of this alleged "wrong" is that they have had to pay premiums based upon the losses incurred by their own classification. Hospitals and non-profit nursing homes, however, have been classified historically in two different "manual" categories. Appellants alleged that this classification is violative of their various constitutional rights as well as a violation of the Defendants–Appellees' statutory duties.

REASONS TO DISMISS THE APPEAL AND AFFIRM JUDGMENT BELOW

I. WHERE THERE IS A SOUND, REASONABLE BASIS FOR A CLASSIFICATION, THERE IS NO VIOLATION OF EITHER THE DUE PROCESS OR EQUAL PROTECTION CLAUSE.

Appellants have assumed that by showing that there is a classification and then chanting the magical incantation "equal protection of the laws" that they have carried their burden of proof. However, as the Trial Court the Ohio Court of Appeals and the Ohio Supreme Court properly found, such is not the case.

In the Trial Court, Appellants introduced the testimony, by way of deposition, of William Darlage, an actuary for the Ohio Bureau of Workers' Compensation. Mr. Darlage testified that he performed an actuarial "study" to determine a base rate for the philanthropic nursing homes. When the base rate for the philanthropic homes was compared to the base rate for profit nursing homes, there was a "significant" difference.

Plaintiffs–Appellants now complain that "this study must be seen as the scientifically useless sham which it is and should be ordered held for naught by this Court as a matter of law." (Appellants Memorandum p. 12) Apparently Appellants wish this Honorable Court to make evidentiary rulings for the Trial Court. However, as the Ohio Court of Appeals noted:

> However, the deposition of William Darlage was introduced by appellants during trial. His study was marked as Exhibit A in the deposition.
>
> It is well settled that a party cannot complain of error that he has introduced into the trial. A party who has introduced a deposition into evidence cannot avail himself of error in its admission. (Citations omitted) (App. A-9)

Appellants introduced the study and now complain of its introduction. They did not, however, introduce any expert evidence to refute the study.

The Industrial Commission further introduced independent expert actuarial evidence at trial to support the classifications set forth in the State Insurance Fund

Manual. As the Court of Appeals noted at page 1526 of its decision (App. A-4), Robert Finger, a fellow of the Casualty Actuarial Society and a member of the American Academy of Actuaries, testified in regard to the study performed:

> A. Okay. What the study was was to take out of Manual 9062, which includes a group of charities or non-profit organizations -- it extricated the nursing homes within that manual classification and treated that loss experience as if that had been a separate manual for the years 1978, 1979 and calculated what the base rates would have been for those years, had the non-profit nursing homes been split out.
>
> Q. And was that also done with 9045?
>
> A. 9045 is just the profit-making nursing homes, and they were already their own classification. So there's nothing special done with that.
>
> Q. *Are you aware of any outside insurance carriers that split out, say of the nursing home industry, on the basis of profitability or non-profit?*
>
> MR. WEBSTER: Object.
>
> THE COURT: Overruled. You may answer.

A. *In malpractice insurance it is very common for hospitals and nursing homes to be classified based on the profit, non-profit or governmental status.*

MR. TATARU: Move to strike. Non-responsive.

THE COURT: Overruled.

Q. (By MR. FOX) Now with regard to that study that you have there, are you familiar with the methodology used in making that study?

A. Yes.

Q. And is that a valid method of calculating the base rate?

A. Yes.

* * *

Q. As a result of that study were you able to find any difference in the philanthropic as opposed to the profit nursing homes?

A. Yes, based on the study, the cost for the profit homes should be about 50 percent higher -- or is -- the cost is about 50 percent higher and therefore *the rate should be about 50 percent higher for the profit homes than for the non-profit homes.* (Emphasis added)

Appellants offered *no* evidence to rebut this testimony. In fact, Appellants introduced *no* expert actuarial, insurance, or statistical evidence whatsoever. The evidence clearly showed that there was a sound, reasonable basis for the different classifications.

Further, Appellants' claim that "the question involved herein is substantial" somehow loses its sparkle when it is considered that these classifications were made somewhere near three-quarters of a century ago and further that Appellants are paying only for the losses which they themselves incur. It is respectfully submitted that if there were not a "significant" actuarial difference between the loss rate for these classes, or if the loss rate were higher for hospitals and non-profit homes, Plaintiffs–Appellants would not be before this Court.

II. WHERE NO EVIDENCE IS PRODUCED TO SHOW A VIOLATION OF THE ESTABLISHMENT CLAUSE, A CLASSIFICATION WILL NOT BE SET ASIDE.

Appellants have alleged that testimony at trial clearly established "an excessive government entanglement with religion in the classification scheme." (Appellants Memorandum p. 8) This allegation apparently stems from Appellants failure to understand what "excessive government entanglement" involves.

The Constitutional prohibition against excessive governmental entanglement with religion was found in the Establishment Clause of the First Amendment. This Court in *Everson v. Board of Education* 330 U.S.1, 67 S. Ct. 504, (1947) stated at page 15:

> The Establishment of Religion clause of the First Amendment means at least this: Neither a state nor the Federal government can set up a church, and neither can pass laws which aid one religion, aid all religions, or prefer on religion over another.

In a recent case, this Court set forth the standard to find a violation of the Establishment Clause. In *Committee for Public Ed., Inc. v. Regan,* 44 U.S. 649, 100 S. Ct. 840 (1980), the Court, per Justice White, stated:

> Under the precedents of this Court a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, its principal or primary effect neither advances nor inhibits religion, and it does not foster an excessive government entanglement with religion. 100 S. Ct. at 846.

In the case *sub judice,* Appellants claim of "excessive entanglement" apparently is an argument that the State of Ohio somehow favors religions by not classifying hospitals, non-profit nursing homes and profit nursing homes all in the same category.

In reviewing the evidence before the Trial Court, however, the Court of Appeals could find no preference given on the basis of religion. The Ohio Court of Appeals noted that the testimony on this issue was given by Mildred Brady and John Bentz, both employees of the Bureau. The Court stated at page 1528 of its decision:

Mildred Brady, at one time the Director of the Underwriting Section of the Bureau of Workers' Compensation, testified that, while she was director, she would have determined classification on the basis of whether or not the particular nursing home was associated with a church.

However, the evidence indicates that Mrs. Brady also testified that she did not have the final authority to determine whether or not a particular employer of industry gets placed in a particular classification. Rather, she testified, while she was there, Mr. Bentz was the person who made the final determination and appeals could be taken from his decision to an adjudicating committee and then to the three commissioners.

Bentz testified: (Tr. 119)

Q. Mr. Bentz, would you *please tell us what the Underwriting Unit does to classify philanthropic homes?*

A. Well, *they must demonstrate to the Bureau that they are a non-profit status.*

Q. Does it have anything to do with whether they are religious or not?

A. *Under Manual Code 9062 there are religious organizations, but in addition to that there are other organiza-*

> *tions who just demonstrate non-profit status.* They are not affiliated, as such, with religious organizations. So there are the two included there. (Emphasis added.)
>
> We conclude that the trial court properly found no violation of the establishment clause of the United States Constitution or Ohio Constitution. (App. A-7) (emphasis in decision)

The fact that religious organizations are, for the most part, nonprofit organizations, is not a basis to find a constitutional violation. As can be seen, the uncontested facts proven at trial were that non-profit nursing homes, both religious and secular, were placed in manual no. 9062. The testimony further showed that this was based on sound insurance principles and such practice is common in the insurance industry.

CONCLUSION

For nearly three-quarters of a century the allegedly egregious acts of the Ohio Industrial Commission have escaped detection. Now Appellants claim that these acts are of great substance and that the Courts need guidance to illuminate the legal standards to be followed. This, however, is simply not the case.

Appellants produced absolutely *no* evidence to show that the actions of the Industrial Commission were based upon unsound insurance principals. Each and every expert testified that there was a "significant" actuarial difference between the classifications. Not only have

Appellants failed to show that their various constitutional rights have been violated, they have totally failed to show that they have been wronged in any way.

For the reasons set forth by both the Trial Court and the Ohio Court of Appeals, the Appellants simply failed to show any constitutional violations. Further, the fact that the profit nursing home industry must pay for the losses that it incurs and is not being subsidized by hospitals and non-profit nursing homes is not a substantial issue for review by this Court.

It is respectfully submitted that this Court should dismiss this appeal, affirm the decision of the lower courts, or, if appropriate, deny the petition for Writ of Certiorari.

Respectfully submitted,

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Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Opposition to Jurisdiction was mailed to all parties or their counsel or record this _____ day of January, 1983, by regular U.S. mail service, postage prepaid.

BERNARD C. FOX, JR.
Assistant Attorney General

APPENDIX

NO. 81AP - 324

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Quality Health Service, Inc., et al.

Plaintiffs-Appellants

v.

William W. Johnston, Chairman,
Industrial Commission of Ohio, et al.

Defendants-Appellees

DECISION
Rendered on May 20, 1982

MR. TERRY TATARU
3040 East Main Street,
Columbus, Ohio 43209,
and
MR. GEOFFREY E. WEBSTER,
50 West Broad Street,
Suite 2610,
Columbus, Ohio 43215,
For Plaintiffs-Appellants

MR. WILLIAM J. BROWN, Attorney General,
MR. BERNARD C. FOX, JR., Assistant,
State Office Tower, 17th Floor,
30 East Broad Street,
Columbus, Ohio 43215,
For Defendants-Appellees.

COOK, J.

On December 22, 1980, appellants Quality Health Service, Inc., et al., filed a class-action suit requesting declaratory and injunctive relief on the basis that appellees William W. Johnston, Chairman, Industrial Commission, et al., set basic workers' compensation rates of contribution for employers in propriatary nursing homes which violated the equal protection, due process and establishment clauses of the United States Constitution and the Ohio Constitution, and R. C. 4121.131, 4123.29 and 4123.34.

After a trial, the court found that there was no violation of appellants' constitutional rights, and appellees acted pursuant to their statutory duties and entered judgment for appellees. The court also found that it did not have jurisdiction to enjoin the Industrial Commission.

Appellants have timely filed an appeal from the judgment of the trial court and have filed the following five assignments of error:

"1. The trial court erred by not finding that the appellants established violations of the equal protection and due process clauses of the United States and Ohio Constitutions beyond a reasonable doubt.

"2. The trial court erred by not finding that appellees violated the establishment clauses of the United States and Ohio Constitutions by determining a manual classification on the basis of religion for the purpose of setting rates of premiums for employers paying into the workers' compensation insurance fund.

"3. The trial court erred by finding that appellees acted pursuant to their statutory

duties in establishing the manual classifications for proprietary and philanthropic nursing homes.

"4. The trial court erred in finding that it lacked jurisdiction to issue an injunction as proper relief for statutory and constitutional violations.

"5. The trial court erred in admitting into evidence a purported study which lacked relevance and a proper foundation,"

The assigned errors are without merit.

Appellants' first assignment of error contends that appellees set the basic premium rates of contributions for employers in proprietary nursing homes differently than said rates for philanthropic nursing homes only on the basis of profit versus nonprofit. They argue that said action by appellees was arbitrary and capricious and violated their United States Constitution and Ohio Constitution equal protection and due process rights.

To be consistent with equal protection, a classification must rest upon some difference that bears a reasonable relationship to the act, in respect to which the classification is proposed. Mere arbitrary selection cannot be justified by being called classification. *Gulf, Colorado & Santa Fe Ry. v. Ellis,* (1897), 165 U.S. 150.

Appellants' due process arguments are apparently addressed to substantive process. As to substantive due process, the Ohio Supreme Court, in *State, ex rel. Allstate Ins. Co., v. Bowen, Supt. of Ins. et al.,* (1936), 130 Ohio St. 347, held that:

> "* * *If the laws passed by the state are seen to have a reasonable relation to a

> proper legislative purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied."

In the cause *sub judice,* the evidence indicates that the Bureau of Workers' Compensation sets manual classifications subject to the approval of the Industrial Commission, and that a manual classification signifies a particular group by industry with some level of hazard and, therefore, are the same rate. The profit nursing homes were placed in Manual 9045, and nonprofit nursing homes were placed in Manual 9062. It was stipulated that the base rate differentials between the two manuals were different.

The evidence also indicated that, at the time the profit and nonprofit nursing homes were placed in the two different manual specifications, no study had been done to form a basis or justification for treating them differently. As a result of a meeting on February 15, 1979, appellees decided to merge the two manual classifications, effective July 1, 1979, because there was no "justification for a difference."

Appellees then requested the actuarial section of the Bureau of Workers' Compensation to perform an actuarial study to determine whether there was a difference. The results of the study showed a "significant" difference between the hazards of the profit nursing homes as compared to nonprofit nursing homes.

Based upon the study, appellee William W. Johnston reversed his order to merge the two classifications and restored the original classifications.

At trial, appellees also produced actuarial evidence which supported the classifications set forth in the State Insurance Fund Manual. Robert Finger, a fellow of the Casualty Actuarial Society and a member of the American Academy of Actuaries, testified in regard to a study he performed: (Tr. 96 - 101)

"A. Okay. What the study was was to take out of Manual 9062, which includes a group of charities or non-profit organizations - it extricated the nursing homes within that manual classification and treated that loss experience as if that had been a separate manual for the years 1978, 1979 and calculated what the base rates would have been for those years, had the non-profit nursing homes been split out.

"Q. And was that also done with 9045?

"A. 9045 is just the profit-making nursing homes, and they were already their own classification. So there's nothing special done with that.

"Q. Are you aware of any outside insurance carriers that split out, say of the nursing-home industry, on the basis of profitability or non-profit?

"MR. WEBSTER: Object.

"THE COURT: Overruled. You may answer.

"A. In malpractice insurance it is very common for hospitals and nursing homes to be classified based on the profit, non-profit or governmental status.

"MR. TATARU: Move to strike. Non-responsive.

"THE COURT: Overruled.

"Q. (By MR. FOX) Now with regard to that study that you have there, are you familiar with the methodology used in making that study?

"A. Yes.

"Q. And is that a valid method of calculating the base rate?

"A. Yes.

"* * *

"Q. As a result of that study were you able to find any difference in the philanthropic as opposed to the profit nursing homes?

"A. Yes, based on the study, the cost for the profit homes should be about 50 percent higher - or is - the cost is about 50 percent higher and therefore the rate should be about 50 percent higher for the profit homes than for the non-profit homes."

We conclude that the evidence shows that there was a sound, reasonable basis for the different classifications. Therefore, the different classifications for profit and non-profit nursing homes were not arbitrary or capricious, and thus did not violate the constitutional equal protection or due process provisions.

Appellants' second assignment of error contends that the trial court erred in finding that appellees did not violate the establishment clauses of the United States Constitution and Ohio Constitution. They argue that the

evidence shows that virtually all nonprofit nursing homes are affiliated with churches, and that church affiliation was the basis for the difference in manual classification between profit and nonprofit nursing homes.

Mildred Brady, at one time the Director of the Underwriting Section of the Bureau of Workers' Compensation, testified that, while she was director, she would have determined classification on the basis of whether or not the particular nursing home was associated with a church.

However, evidence indicates that Mrs. Brady also testified that she did not have the final authority to determine whether or not a particular employer of industry gets placed in a particular classification. Rather, she testified, while she was there, Mr. Bentz was the person who made the final determination and appeals could be taken from his decision to an adjudicating committee and then to the three commissioners.

Bentz testified: (Tr. 119)

"Q. Mr. Bentz, would you *please tell us what the Underwriting Unit does to classify philanthropic homes?*

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"Q. Does it have anything to do with whether they are religious or not?

"A. *Under Manual Code 9062 there are religious organizations, but in addition to that there are other organizations who just demon-*

strate non-profit status. They are not affiliated, as such, with religious organizations. So there are the two included there." (Emphasis added.)

We conclude that the trial court properly found no violation of the establishment clause of the United States Constitution or Ohio Constitution.

Appellants' third assignment of error argues that the trial court erred in finding that appellees did not violate their statutory duties.

R. C. 4123.29 states, in part, as follows:

"The industrial commission shall classify occupations or industries with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total payroll in each of said classes of occupation or industry sufficiently large to provide a fund for the compensation provided for in Chapter 4123. of the Revised Code, and to maintain a state insurance fund from year to year. * * *"

R. C. 4123.34, in pertinent part, states:

"The industrial commission, in the exercise of the powers and discretion conferred upon it in section 4123.29 of the Revised Code, shall fix and maintain, for each class of occupation, or industry, the lowest possible rates of premium consistent with the maintenance of a solvent state

> insurance fund and the creation and maintenance of a reasonable surplus, after the payment of legitimate claims * * *."

Appellants argue that the trial court's conclusion of law No. 4, which states "Plaintiffs must prove beyond a reasonable doubt that there is no state of facts which may reasonably be conceived which would justify separate 'State Insurance Fund Manual' classification, * * *" referred to their claim of statutory violations by appellees.

A reading of the trial court's findings of fact and conclusions of law indicates that, by his conclusions of law No. 3, 4, and 5, the trial court was speaking of "classifications" and the denial of equal protection.

The only finding by the trial court as to any violation of statutory duties is conclusion of law No. 11, which was a finding that there was no violation of appellees' statutory duties.

Appellants argue that the acts of appellees in carrying out their statutory duties acted in an arbitrary, capricious, and unreasonable manner. However, such argument is without merit for the reasons set forth as to the first assignment of error.

In their fourth assignment of error, appellants claim that the trial court erred in finding that it lacked jurisdiction to issue injunctions. However, such a finding cannot be prejudicial error since the court found appellees had not violated any constitutional or statutory provisions.

In their fifth, and final, assignment of error, appellants contend that the trial court erred in admitting into evidence a study by William Darlage, Operations Coordinator and Adjustment Unit Supervisor in the Actuarial Section of the Bureau of Workers' Compensation. The study attempted to determine the base rates of the manual specifications as they were used for the July 1, 1978, and July 1, 1979, rating periods.

However, the deposition of William Darlage was introduced by appellants during the trial. His study was marked as Exhibit A in the deposition.

It is well settled that a party cannot complain of error that he has introduced into the trial. A party who has introduced a deposition into evidence cannot avail himself of error in its admission. *Hulett v. Friedrich* (1926), 115 Ohio St. 25. Nor can a party complain that evidence is introduced by the adverse party which serves to explain or rebut evidence introduced by himself. *Thomas F. Taylor v. John Boggs,* (1870), 20 Ohio St. 516.

In view of the testimony of William Darlage, the "study" was relevant.

For the foregoing reasons, appellants' five assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas, is affirmed.

Judgment affirmed.

WHITESIDE and MOYER, JJ., concur.

COOK, J., of the Eleventh District Court of Appeals, sitting by assignment in the Tenth District Court of Appeals.